

# COPIES, RIGHTS & COPYRIGHTS

***REALLY OWNING  
YOUR  
DIGITAL STUFF***

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1. Consumers who legally own copies of works have personal property rights in those copies, just like they have property rights over other goods.
2. Those rights need to be balanced against the rights of the author or copyright holder in the work.
3. The first sale doctrine plays an important part in maintaining that balance, but is currently written for physical copies, not digital works.
4. Works sold as digital downloads are hard to distribute without making copies—something that the first sale doctrine doesn't clearly allow today.
5. Other aspects of digital media make consumers' rights over their property more tenuous than before.

## Introduction: Property Rights and Copyrights are in Conflict

Without any education in copyright law, pretty much everyone can explain what they can legally do with the books, CDs, and DVDs that they own. They can use them, lend them, give them away, sell them, and so on. They can't copy them and distribute those copies at will. Transfer those same copyrighted works into the format of digital files, though, and the law starts to diverge sharply from intuition. It's an open question as to whether or not I can sell someone my "used" mp3s, even if I delete them after I send them over. A number of lawyers will still argue over whether or not I can rip my DVD of *The Avengers* to my iPad. And I may not be able to give my ebook collection to my heirs when I die.

It's a basic feature of our laws that you have a lot of rights over your own physical property. You can sell your car to whomever you like, repair it, modify it up to (and well beyond) the bounds of taste or sanity, lend it to anyone, and even rent it out for others to use. The same is true of pretty much anything else you have in your possession—your umbrella, your coat, and your desk. But reach over to those software discs on your desk and something changes—you're standing on much shakier ground. And if you pull out an audio CD from the dusty stack next to those, things can get even more complicated.

To a large extent, this difference is due to copyright law, which gives authors particular rights over how other people can use their creative works. This power contrasts, and occasionally conflicts with, ordinary property law.



**Even though you own them both, you can rent your car but not your CDs.**

**M**ini-Glossary: Throughout this paper, I'll be referring to "copies" and "works" as two different concepts. Work: In copyright law, a "work" is the creative thing that the author made. Copy: a "copy" of a work is a physical material object that embodies the copyrighted work—the individual volume of bound paper, CD, or chunk of flash RAM that holds a particular instance of a work. While a work can't be copyrighted until it's embodied in at least one copy, once that happens, the ownership of the copyright is a completely different question from the ownership of the copy. A "phonorecord" is just like a "copy," except that a phonorecord embodies recorded sounds, like a particular LP, CD, or mp3 file. For reasons I won't go into here, the Copyright Act defines copies and phonorecords differently. For the sake of simplicity, when I talk about "copies" in this paper, I'm almost always including "phonorecords" as well.

For instance, no one would question my right (though many might question my ability) to modify my car, sell it, lend it, or even rent it out. Toyota doesn't get to say that I can't paint it plaid, or pry off its logo and replace it with my own. The makers of my jacket similarly have no way to prevent me from patching it, modifying and reselling it, or even making new jackets that look like it.

While Toyota or the Gap can't prevent me from doing these things, the creators of copyrighted works can. Most often, we think of copyright law as allowing an author to prevent others from reproducing that work. But it does a lot more. If a work is copyrighted, I also can't: distribute it, make modified versions of it, or display it publicly without permission.<sup>1</sup>

Look at the distribution right, for instance. If we accepted, as the law says, that a copyright holder can prevent me from distributing my copy of their copyrighted work, then I would be breaking the law by lending a friend my *Justified* Season 1 DVD. It would also be illegal for them to give me a copy of *Justice for Hedgehogs* for my birthday. It would also make it illegal for libraries to lend books, for used record stores to sell anything, and for people to make charitable donations of much clothing.<sup>2</sup> Each of those transactions is a distribution, and, under the terms of the Copyright Act, can't happen without the permission of the copyright holder.

Of course, we live in a world where we have the right to give, lend, and sell our copies of copyrighted works, and that's because of another part of the copyright law called the first sale doctrine. But changes in technology and the way we buy and sell creative works are starting to erode those rights without anyone noticing. To explain how, and how to set things on a better path, we'll first need to dig a little bit into the history of the first sale doctrine.

<sup>1</sup> These particular uses are the things that an author can exclude others from doing—they are the exclusive rights of the author, detailed in section 106 of title 17 of the U.S. Code. 17 U.S.C. § 106.

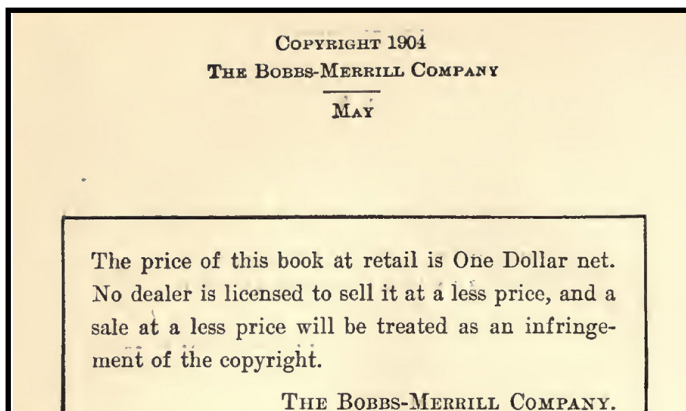
<sup>2</sup> Even if the clothing itself isn't or can't be copyrighted, certain things on it can be. Designs on T-shirts can be copyrighted, certain prints can be, and even the images on labels can be subject to copyright law.

## The First Sale Doctrine: What it is, and Where it Came From

### A Foundational Supreme Court Case: *Bobbs-Merrill v. Straus*

Regardless of who owns the copyright in the work, if I own a legally-produced physical copy of that work, I can give it away, lend it, sell it, rent it, and dispose of it as I please. This doctrine relies upon being able to distinguish between a copyrighted *work*—the words that make up a novel, for instance—and a *copy* of that work—the individual mass of paper, ink, and glue that makes up the paperback containing and embodying the novel. This also squares nicely with common sense and ethical norms—having the right to control how people copy a work shouldn't extend into controlling everything they can do with their personal property. This is why I can sell you my copy of *Bossypants* right now, but can't sell you the right to turn it into a movie, or even an audiobook.

The origins of this doctrine go back over a century in the United States. In 1908, the Supreme Court decided *Bobbs-Merrill Co. v. Straus*,<sup>3</sup> a case that serves as the foundation for the first sale doctrine in the United States. In 1904, Bobbs-Merrill, a publishing company, released a book called *The Castaway*. Inside the book's cover, it also printed the following notice:



**“The price of this book is One Dollar net. No dealer is licensed to sell it at a less price, and a sale at a less price will be treated as an infringement of the copyright.”**

Macy's, when it was selling the book, ignored this notice and sold copies of the book for eighty-nine cents apiece. Bobbs-Merrill sued, and when the case eventually made its way to the Supreme Court, the Court held that Macy's hadn't infringed Bobbs-Merrill's copyright.

The Court's reasoning was that the publisher, in selling the book, gave up its rights to control how its customer sold it later:

[O]ne who has sold a copyrighted article, without restriction, has parted with all right to control the sale of it. The purchaser of a book, once sold by authority of the owner of the copyright, may sell it again, although he could not publish a new edition of it.<sup>4</sup>

Legal scholars typically characterize *Bobbs-Merrill* as the origin of first sale in American law, and it's temptingly easy to draw a line straight from that case to the relevant section of our copyright laws today. Section 109 codifies the ability of owners of individual copies to control them, with or without the copyright holder's permission:

[T]he owner of a particular copy or phonorecord lawfully made under this title, or any person authorized by such owner, is entitled, without the authority of the copyright owner, to sell or otherwise dispose of the possession of that copy or phonorecord.<sup>5</sup>

Or, to put it less formally, if you own a copy, you can distribute it as you like, and the copyright owner can't stop you.<sup>6</sup>

## The Legacy of Bobbs-Merrill Today: First Sale and Restrictions on Distribution and Display

So if we look at the various things that you can do with a copyrighted work (at least, the things that copyright law cares about), we can see how first sale balances the tension between the rights of property owners and the rights of authors: it divvies up the traditional collection of copyright rights between owners and authors. First sale sides with property owners with regard to distribution and public display, and with authors on reproduction, public performance, and the preparation of derivative works.

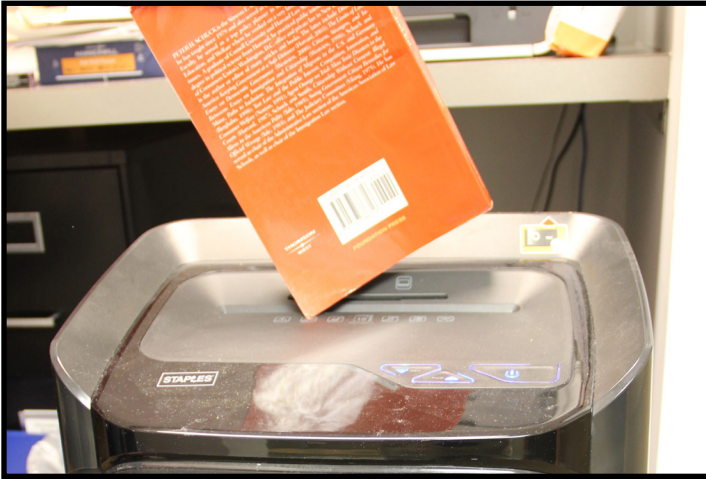
But why are the traditional copyright rights divvied up this way? Why do individual copy owners get the distribution and display rights, and copyright owners get the others? The answer is that there's a clear link between the rights that we grant to the owner or user of the copy and what we see as her natural ability to control the objects in her possession. She is free to distribute and display, or even discard and destroy, all of the things that she owns. This applies both to copyrighted and non-copyrighted goods.

<sup>3</sup> 210 U.S. 339 (1908).

<sup>4</sup> *Id.* at 350.

<sup>5</sup> 17 U.S.C. § 109(a).

<sup>6</sup> Section 109 also explicitly permits owners of copies to *display* those copies publicly. It's therefore not an infringement for me to hang a poster that I own in a shop window. This part of the first sale doctrine was codified in 1976; before then, there actually wasn't even a display right: it was perfectly legal for anyone at all to display a work without the copyright holder's permission.



**This is not against copyright law.**

But when I replicate—copy—my own property, we start to ask questions about the nature of the thing I’m replicating. If I build a three-legged stool based off the pattern of one I’ve bought, I’ve spent the time, effort, and raw materials to make the reproduction. Given that a three-legged stool is not something particularly creative (and certainly not original), it seems natural that the new stool is mine. But if I make a copy of a book I’ve bought, even if I’ve provided my own paper and ink, something seems considerably different about what I’ve done, even before we take the laws into account.

So first sale’s division of rights makes some sense. But there are still problems at the boundaries of copyrights and ownership rights. While we don’t want individual copy owners making more copies willy-nilly, we might want to allow them to make partial copies of small portions to repair a damaged copy, or highlight and annotate a book, creating a derivative work. A strict reading of copyright law might call these activities infringements. But first sale is more than just distribution. Its primary intent was never just to limit a copyright holder’s distribution rights; it was to preserve the personal property rights of the person who owned the physical copy of the work. And owning something means you can do a lot more than just resell it.

## Beyond Bobbs-Merrill and Distribution

### First Sale Goes Beyond the Distribution Right

The rights of owners to mess about with their own stuff is embedded throughout the history of copyright law. In a series of cases leading from at least the 1890s up to today, courts have allowed owners of copies to repair them, modify them, adapt them, display them, and even perform them—not just distribute them.<sup>7</sup>

If you take a step back to look at this larger legal picture, you can see a pattern that shows courts and a Congress concerned with people’s rights to exercise control over the physical objects in their possession—their personal property. That recognition of personal property rights then overrides copyrights in situations going far beyond distribution and display.

#### *Owners Can Reproduce in Order to Repair Copies*

About twenty years before the *Bobbs-Merrill* case was decided, a fire broke out at a publisher’s warehouse, damaging the unbound pages of a book. The copyright holder told its bookbinder to sell the salvaged sheets as wastepaper, which they did. However, that “waste paper” was bought up by a seller of used books, who bound them together and sold the repaired and reassembled books.<sup>8</sup>

The copyright holder objected and sued the bookseller. In this case, an appellate court held that the copyright holder gave up its rights under copyright law to restrict what happened to the individual copies after sale.<sup>9</sup> As *Digital Exhaustion* points out, this case isn’t just a prefiguring of *Bobbs-Merrill*’s limits on distribution; it actually creates the idea of a “right to repair” that a number of other cases followed up on.<sup>10</sup>

<sup>7</sup> Aaron Perzanowski & Jason Schultz, *Digital Exhaustion* 58 U.C.L.A. L. Rev. 889 (2011). This paper gives in more detail the examples of non-distribution exhaustion rights that I list below, and more. I also owe much to this paper for framing the dichotomy between the traditionally-understood history of the doctrine and its less-popularized roots.

<sup>8</sup> *Harrison v. Maynard, Merrill & Co.*, 61 F. 689 (2d Cir. 1894).

<sup>9</sup> *Harrison*, 61 F. at 691. Whether the copyright holder could sue under contract was a different matter—the defendant in that case had actually signed a contract that agreed to use the sheets only as paper stock.

<sup>10</sup> Perzanowski & Schultz, *supra* note 7, at 912-13.



Repairing damage could require reproducing parts of this book. (c) Larry Wentzel, shared under CC BY 2.0. <http://www.flickr.com/photos/wentzelepsy/4368668376/>

In a case from 1901, for instance, a bookseller bought a number of damaged, “soiled and torn” schoolbooks, repaired them, and sold them.<sup>11</sup> The repair involved a lot more than just stitching together some sooty pages, though: in addition to rebinding the books, the seller replicated new covers to replace irreparably damaged ones. So long as the seller didn’t try to pass off these books as new, the court decided, it was perfectly free under copyright law to rebind, re-cover, and make exact imitations of the old covers.

In making its decision, the court explicitly drew an analogy to the “right of repair” held by owners of patented inventions. Although a patent holder has the exclusive right to prevent uses of the patented invention, someone who has bought a machine embodying that patent has the right to continue using it, including repairing it. Owning the thing that embodies the invention therefore gives the owner rights over the thing going beyond deciding how she wants to distribute it: she also has the right to reproduce bits of it—at least to the extent needed to repair the copies that she already owns.

## Owners Can Adapt and Modify Their Copies by Combining them with Other Things

A number of other cases also allowed resellers to buy existing printed works on the open market, rebind them into collections and anthologies, and sell them anew. In 1903, Rudyard Kipling sued a publisher who had paid for unbound pages of his works, compiled them with other Kipling works and a Kipling biography, and bound them together. More than just being a distribution of the already-purchased works, this was the creation of a new, derivative work.<sup>12</sup> The court allowed this.

Similarly, in 1942 a publisher bought copies of comic books, bound them together with comic books from different publishers, and sold them under the name Double Comics. A court held that this newly created anthology wasn’t an infringement of copyright, either.<sup>13</sup>

Both of these cases show that, once the copyright holder had sold his particular copies of a work, it was perfectly fine for the new owner of the copies to use them as he liked, up to and including literally gluing or stitching them into a new collection. This rationale would square with the instinct that it shouldn’t actually make a difference whether a newsstand staples a copy of *Us Weekly* to a copy of *The Economist* and sells them together, or sells the two magazines separately.

Courts today, though, might come to a different conclusion. More recent cases are split on whether modifying an existing work and re-selling it creates an infringement. Take the example of A.R.T., a company that buys copyrighted books and prints, cuts out images from them, and then affixes those images to ceramic tiles. A.R.T. was found to be infringing the derivative works right in the Ninth Circuit, but lawfully making use of first sale in the Seventh.



This, according to the *Double Comics* case, is also not copyright infringement.

<sup>11</sup> *Doan v. American Book Co.*, 105 F. 772 (7th Cir. 1901).

<sup>12</sup> *Kipling v. G.P. Putnam’s Sons*, 120 F. 631 (2d Cir. 1903).

<sup>13</sup> *Fawcett Publ’ns v. Elliot Publ’g Co.*, 46 F. Supp. 717 (S.D.N.Y. 1942).



**A derivative work: A part of a collage made from magazine cut-outs. “Render unto Caesar”, Harley Lorenz Geiger, 2005**

The Ninth Circuit decided that the tiles, themselves creative works, were “derivative works” prepared from the original graphics from the books and prints. Since the Copyright Act says that you need permission to prepare derivative works from copyrighted works, it found A.R.T. liable for copyright infringement.<sup>14</sup> The Seventh Circuit, however, didn’t think that A.R.T. was creating a separate, derivative work by epoxying the images to a tile. Instead, it characterized putting the prints onto tiles as akin to putting a painting into a new frame.<sup>15</sup> This wouldn’t create a new work, the court reasoned.

It seems odd that liability should rest upon whether or not you think that pressing a paper print onto a tile and glazing it is more like reframing or more like creating a collage. After all, we generally accept collages—certainly new works, and preparations of derivative works—as ethically permissible things. While the Seventh and Ninth Circuits officially differed on whether or not the tiles were new creative works, there’s also a key difference that the Seventh Circuit picks up on, but that isn’t clearly distinguished in the Copyright Act. That’s the fact that in a collage or with these tiles, the old work is incorporated into the new object, meaning that there is no replication of a creative work (unlike, for instance, a derivative work like an audiobook made from a book, or a movie made from the script of a play).

These cases indicate that, certainly before the 1976 Copyright Act, the law allowed owners of copies to attach those copies to other works and resell the result. And as the Seventh Circuit’s A.R.T. decision shows, owners of lawfully-made copies can make derivative works by incorporating those existing copies into new works.

## First Sale’s Origins in Property Rights Highlight the Limits of Current Law

These various examples show us that the idea of preserving the power of property owners over individual copies goes beyond just preserving owners’ ability to distribute and display those copies. Just as I can repair and modify my jeans, I can repair and modify my books, even if doing the latter involves a little bit of reproduction or preparation of a derivative work.

There thus seems to be a principle that says the law should allow owners some ability to do more than distribute and display their copies, but that wouldn’t tread too heavily on the rights of authors to maintain a monopoly on making new copies of their works.

This would seem to parallel the situations of repaired and re-bound books discussed earlier. In fact, this model of thinking is explicitly mentioned in that old touchstone case, *Bobbs-Merrill*:

In our view, the copyright statutes, while protecting the owner of the copyright in his right to multiply and sell his production, do not create the right to impose, by notice ... a limitation at which the book shall be sold at retail by future purchasers, with whom there is no privity of contract.

This focus on the right to “multiply and sell” shows that the Court is really interested not just in the mechanical act of reproduction, but on its effect on the market—if the number of copies hasn’t increased, then there isn’t a harm to the copyright holder. The *Double Comics* case explicitly cited this concept of multiplication in its holding:

The decisions appear to be uniform that the purpose and effect of the copyright statute is to secure to the owner thereof the exclusive right to multiply copies...<sup>16</sup>

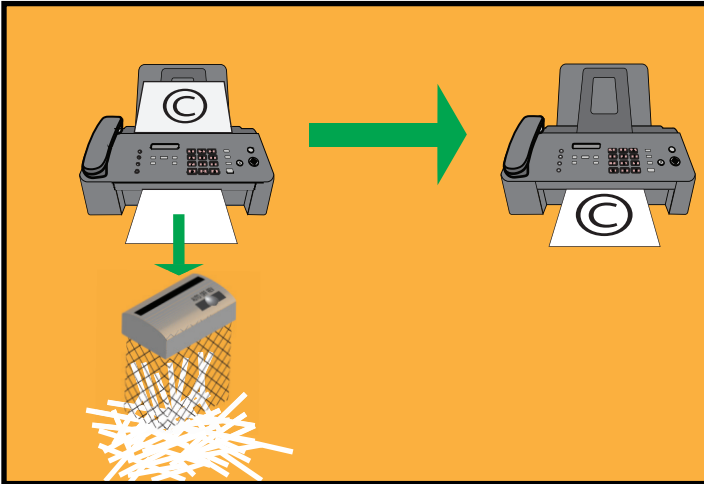
The fact that the number of existing copies didn’t change is crucial to the decision here, as it is in any number of first sale cases predating the current version of the law. Imagine, for instance, that I had a photocopier that, as it made a copy of each page, shredded the original.

<sup>14</sup> *Mirage Editions, Inc. v. Albuquerque A.R.T. Co.*, 856 F.2d 1341 (9th Cir. 1988). If this seems weird to you, you’re not alone. But the particular way the Copyright Act is written makes it a plausible, if not the most commonsense, interpretation of the law.

<sup>15</sup> *Lee v. A.R.T. Co.*, 125 F.3d 580 (7th Cir. 1997).

<sup>16</sup> *Fawcett Publ’ns*, 46 F. Supp. at 718 (citing *Bobbs-Merrill* and *Jeweler’s Circular Pub. Co. v. Keystone Pub. Co.*, 281 F. 83 (2d Cir. 1922)).

Or maybe a fax machine that did the same thing. In feeding a copy into the machine, I'm destroying one (original) copy at exactly the same time a new copy is made. If the important thing to the author is the right to prevent her work from being multiplied, then my fax-shredder isn't infringing on her rights, since only one copy goes in, and only one copy comes out. I haven't enriched myself—quite the opposite, since the photocopied book is certainly worth less on the open market. And I haven't had a significant economic effect on the author's monopoly—once I'm done with my bizarre little destructive copying procedure, the exact same number of copies still exists in the world.<sup>17</sup>



**The end result is the same as if you had mailed the document.**

This question of multiplication explains the tension we can see in the cases about prints being made into decorative tiles. Current law gives authors the exclusive right to prepare new derivative works based on their original creative works. But what counts as the preparation of a derivative work can include a lot of different things, such as converting a book to a screenplay, creating a satirical version, revising or annotating a work, and translating a work into a different language. In many of these cases, that new creation does in fact act as a multiplication of the original, displacing or at least diluting the market for the original work.

The idea of copyright working to protect against the multiplication of the original work also shows why copyright law treats public display and public performance differently. After all, a public display of a copyrighted work doesn't multiply the copy or its uses.<sup>18</sup>

Even if that copy's image is projected by some means of technology, the law doesn't care so long as the projection doesn't appear in a different place than the original copy's location. This limitation, then, tells us something about the boundaries of what we generally are willing to accept as outside the restrictions of copyright—so long as there's a one-to-one correspondence between the object itself and its interaction with the rest of the world, it seems ok, even if you're employing technology to make that interaction easier. But if I have a poster in one location, and I display an image of it in another location, I'm effectively multiplying the uses of the work—something I'm not allowed to do under section 109.

Public performance, though, occupies a slightly different place in the law. Certainly before recorded media became the default method of consuming music, dramas, and other sequential works, they had to be publicly performed in order to be enjoyed. In such an environment, people were less likely to consider the fixed copy—the musical score or the script of a play—to be the ultimate embodiment of the creative work. They were much more likely to see the performance itself as that ultimate embodiment, even if the final result wasn't a tangible thing. In that case, making additional public performances from the work would be multiplying that final embodiment, breaking the author's monopoly on economically significant uses of the work. This can explain why public performance has, for a much longer time, been considered a right reserved for copyright holders, whereas public display hasn't been.



**This is what a "performance" was before film and recorded sound.**

<sup>17</sup> It's also worth noting that, in protecting the interests of the copyright holder, the relevant question isn't just the number of copies or creative objects in the world, but in the *market*. If I make a zillion copies of a book and then lock them away in a vault until the copyright term has expired, I still haven't affected any sales of the book under copyright, either directly or indirectly. By the same token, it doesn't matter if I, through my own incompetence with file systems, manage to duplicate a lawfully-bought mp3 five different times on my hard drive, if they never go anywhere before I discover and delete the duplicates.

<sup>18</sup> The current language of section 109 also includes permission for copy owners to project images of the object to viewers, so long as they project only one image of that copy at a time, and only to viewers who are in the same place as the copy. 17 U.S.C. § 109(c).



Public performance thus differs from display in that display doesn't harm the inherent interests of the copyright holder. Even in the visual arts, the relevant creative entity is generally the fixed work itself, not the act of an audience viewing it. Even if a museum charges money for people to come in and view a painting, this public display isn't displacing or even diluting the value that the painter receives from his monopoly. That is earned upon sale of the painting itself, and the new owner of the physical object gets to decide how she wants to display it, control access to it, and so on.

However, the traditional understandings of concepts like reproduction and adaptation don't work as well as this formulation would have it. Technology is showing how some of the older formulations of the boundary between copyrights and ownership rights don't fit current usage. For instance, the way we exchange works with each other electronically is significantly different from physical exchanges: instead of mailing singular copies of works to each other on printed paper or even physical CDs, we send signals to each other that allow the recipients to make perfect copies of the files we have. Like a fax machine, we're making reproductions instead of distributions. And lots of uses of digital files result in making many copies of the file, even though those additional copies are all stored on the same machine and basically don't touch the market.

In rare cases, Congress has stepped in to help fill in the gaps between analog and digital uses of copyrighted works, and these cases might help show us a way forward for fixing newer problems that are emerging. One primary example of that is the "essential step defense."<sup>19</sup>

## **Resolving Digital Issues: "Essential Steps" as an Existing Example of Reconciling Owners and Authors**

Every time you run a computer program, copies of it are made in your computer's RAM. Other copies of the program, or bits of it, might additionally be made in other parts of your computer. The making of these copies is essential to your being able to use the program at all. But copies are exactly what copyright is designed to regulate. To prevent every computer user from becoming an infringer automatically, the law says that it's ok for the owner of a copy of a computer program to make copies or adaptations of the program that are "essential steps" in the program's utilization.<sup>20</sup>

This concept was written into law in 1980, in the wake of an expert report that noted that computers necessarily made copies of the programs they were running, and that this shouldn't subject a user who owned the copy to copyright liability.<sup>21</sup> While this might seem a bit far removed from the ability to stitch together nineteenth-century textbooks, the rationale behind it is the same. The owner of the copy has a right to use that copy in the way it was intended to be used. In the case of computer programs, copyright law shouldn't stand in the way of that owner using his own property. Just as a reader naturally has the right to read any book she owns without seeking permission, the fact that digital technology requires copying shouldn't make second-class consumers out of computer users.

In this case, we can see Congress, as early as the 1970s and 80s, wrestling with the conflict between copyright's restrictions on reproduction and the essential nature of reproduction in digital technology. But this example is also a more recent reflection of a trend shown in older first sale cases: the need for copy ownership to supersede copyright ownership.

But this particular solution, created over thirty years ago, is inadequate for today, in a couple of different ways. First, our uses of digital media have expanded (now, music, movies, and books are all used—and necessarily copied whenever they're used—on computers and other digital devices.) Second, the business practices surrounding the sale of software have evolved to prevent the right to make necessary copies from applying in the vast majority of situations. We'll take a look at some of these problems, among others, in the next section. And after that we'll talk about how to fix them.

<sup>19</sup> 17 U.S.C. § 117.

<sup>20</sup> 17 U.S.C. § 117.

<sup>21</sup> National Commission on New Technological Uses of Copyrighted Works (CONTU) Final Report, 1979 (*available at* <http://digital-law-online.info/CONTU/>). In fact, the CONTU Report says that anyone who "rightfully possesses" a copy of a program should be able to make the copies required to use it, whereas section 117 only affords that right to someone who lawfully owns a copy. CONTU Report 13.

## Emerging Threats to Property Ownership: the Erosion of First Sale

In reconciling the rights of copy owners over their property with the rights of copyright holders, the first sale doctrine preserved the fundamental right to property as copyright law grew and developed. But its particular wording and structure in the law itself had flaws when it was drafted—flaws that have become more apparent due to changes in technology and how we exchange goods.

### Who Owns the Digital Copy?

Under our current copyright laws, only the owner of the copy gets to distribute it without permission from the copyright holder. But if you take the word of most software companies, you don't actually own your own software.

Typically, when a consumer downloads an authorized copy of a computer program, or comes home from the store with a disc containing the software, he'll be confronted with an End User License Agreement, or EULA, as he installs it. Frequently among the pages of legal language contained in the EULA is a sentence that says something like "This software is licensed to you, not sold."

It seems to be an odd thing for a form contract to assert, but that sentence is an attempt to assert that the consumer who pays for a specific copy of that computer program isn't its "owner." This would mean that first sale doesn't apply, and the user/owner has no right to distribute the program after purchase.<sup>22</sup>

This trick allows software manufacturers to go after people who would sell used copies of software. For instance, Autodesk, the makers of AutoCAD design software, successfully sued a man who was trying to sell used copies of AutoCAD on eBay.<sup>23</sup> This man, Timothy Vernor, actually bought the copies of AutoCAD from someone else, and had never installed the software on his own computer.



After 16 years, Interplay hasn't asked for this back yet.

That meant that he never agreed to Autodesk's EULA. Despite the fact that he had never entered into an agreement with Autodesk not to sell the copies, the Ninth Circuit still found him liable for copyright infringement.

Because that original user, according to the terms of the EULA, never became the owner of the software, the Ninth Circuit held that first sale could never apply to that copy.<sup>24</sup> Even though Vernor had complete physical control of the disks on which the software was embedded, and bought them from someone who had legitimately purchased them in the first place, according to the court they belonged to Autodesk the whole time.

The same is likely true for most of the software installed on your computer. If the EULAs are to be believed (and the Ninth Circuit and others certainly believe them)<sup>25</sup> then you don't actually own the discs you bought at Best Buy or the programs you downloaded to your hard drive. And you certainly won't be able to resell them after you're done, except according to the terms specified in the fine print of the EULA.

The problem of EULAs also arises when we talk about the essential step defense. As I mentioned above, this doctrine lets the owners (but not mere users) of computer programs actually use them without having their RAM copies infringe copyright. However, EULAs render this idea inoperative in a large number of cases. If the EULA is to be believed, and the person who purchased the software does not own it, any use of the program by the user (which requires the making of RAM copies) is a copyright infringement.

<sup>22</sup> The origins of EULAs aren't necessarily so sinister. Initially, software manufacturers weren't sure whether or not software, a functional thing, could even be copyrighted. Since they weren't sure about that protection, they often tried to prevent users from making unauthorized copies of their programs through contract law, and tried to create legal systems by which they could enforce a copyright-like set of restrictions even in copyright's absence. See *Softman Prods. Co. v. Adobe Sys.*, 171 F. Supp.2d 1075, 1083 (C.D. Cal. 2001). But even in their early days, EULAs were at least in part intended to get around the first sale doctrine; in fact, section 109's current prohibitions on renting software grew up out of enforcement concerns, and were cited by the Third Circuit in 1991 as rendering EULAs that specified that transactions were licenses and not sales "largely anachronistic." See *Step-Saver Data Sys. v. Wyse Tech.*, 939 F.2d 91, 96 (3d Cir. 1991).

<sup>23</sup> *Vernor v. Autodesk, Inc.*, 621 F.3d 1102 (9th Cir. 2010).

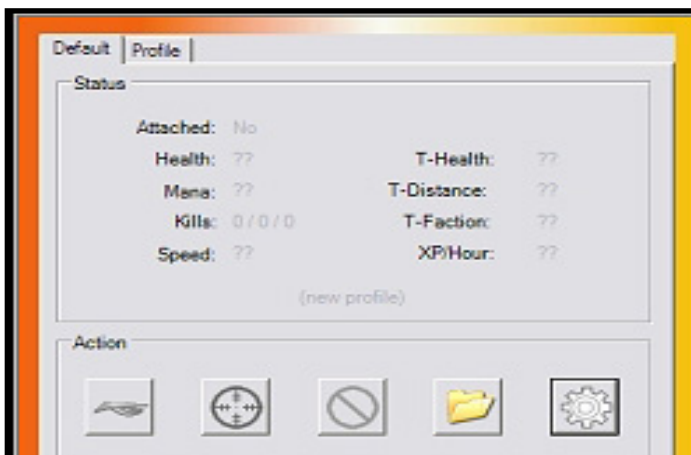
<sup>24</sup> *Id.* at 1112.

Of course, the program authors have no interest in making all of their users copyright infringers, so they grant them permission to make normal uses of the program. The catch is that the manufacturer then gets to decide what is and isn't normal use.

This issue arose when a company called MDY started making a computer program that would play the computer game *World of Warcraft* for its users. The game-playing program, a "bot" named "Glider," allowed *World of Warcraft* players to automate tedious tasks, like killing certain numbers of computer-controlled enemies, so that players could more quickly and conveniently gain additional experience points and in-game items.

Using bots, however, was prohibited by the terms of service and the EULA drafted by Blizzard, the maker of *World of Warcraft*. Blizzard therefore sued MDY for ... copyright infringement. While players using Glider may well have been breaching a contract with Blizzard, the striking thing about the case was that Blizzard didn't just sue MDY for encouraging players to break that contract. It sued MDY for encouraging them to *infringe copyright*.

But since those rules had been built into the same EULA that (1) said that the players didn't own their copy of the game and (2) only granted permission to make RAM copies of the game if they obey the rules, Blizzard argued that the RAM copies that any player made while also using Glider in violation of the rules were copyright infringement.<sup>26</sup>



Glider at work.

Fortunately, the Ninth Circuit disagreed and said that MDY wasn't inducing copyright infringement.<sup>27</sup> While this prevented MDY for being liable for copyright infringement for doing something completely unrelated to copyright, future cases may not come out the same way. This will be especially true as lawyers revise EULAs in light of the Ninth Circuit's decision in this case.

This possibility is particularly troubling in light of the fact that *Bobbs-Merrill* began as a dispute over a EULA of sorts. Macy's was disregarding a printed notice placed there by the publisher that insisted that the books had to be sold at a particular price. If the publisher had simply framed its notice more carefully, would we really lack a first sale doctrine in the first place?

## Born-Digital Media: How Do You Distribute Without Reproducing?

Other problems with the first sale doctrine arise from problems that were even less foreseeable the last time that our copyright law was revised. One such problem is how owners of downloaded copies might legitimately distribute them. For instance, a user who buys an mp3 on her computer as a download from an online store has a copy sent directly to her hard drive. If she decides she no longer wants it and wants to give it to a friend, how does she do it?

Any way that she might try to get the file to that friend, short of handing over her whole hard drive, would require the making of a copy. This raises the question of whether or not first sale could apply at all to downloaded media. Music, movies, and books are increasingly being sold as downloads, such that the individual copies owned by consumers were never fixed in a particular piece of physical media until they hit the user's hard drive. Once fixed there, they become much more difficult—legally, if not practically—for anyone to move them off.

It may seem strangely formalistic to say that, if at the beginning of the process, Alice has one copy and Bob has none, and that the end of the process, Bob has one copy and Alice has none, that there's been a reproduction and not a distribution. But copyright law is rife with strange formalisms, and more to the point, there are plenty of litigants willing to try to inject even more into its corpus.

<sup>25</sup> The Ninth Circuit has adopted a three-part test to decide whether or not a particular copy is owned by the individual consumer or just licensed by her. *Vernor*, 621 F.3d at 1111. However, it's not entirely clear if this test is supposed to be based on the text of the EULA or some more objective determination of the facts of the transaction.

<sup>26</sup> *MDY Indus., LLC v. Blizzard Entm't, Inc.*, 629 F.3d 928 (9th Cir. 2010).

<sup>27</sup> The court came to this decision for a couple of different reasons. First, the court (cont'd)

As more and more media is born digital—that is, sold just as bits to be downloaded and not tied to any physical media—the idea that no one can ever actually “distribute” a digital file without reproducing it can reap big rewards for copyright holders. When CDs are as obsolete as 8 tracks, and if there’s no physical media on the market, then there will never be sales of used media. No more used book stores. No more second-hand music shops. You would have to buy everything from the original producer. In light of this, copyright holders have every incentive to ensure that the law interprets any digital transfer as a reproduction and not a distribution.

## Digital Media Beyond Essential Steps: RAM Copies of Non-Computer Programs

The increase in digital media also highlights a limitation of the essential step doctrine as it is written today. As written, the law allows owners of computer programs to make RAM copies without infringing the reproduction right. Other types of digital media aren’t specifically included. Every time you play an mp3 or a video file, bits of it are almost certainly being copied into RAM as the file is buffered and cached in various ways. Even streaming audio and video results in the making of temporary copies. The legal status of these copies is uncertain. These temporary RAM copies certainly can be considered reproductions for the purposes of copyright law,<sup>29</sup> but they don’t necessarily have to be.<sup>30</sup>

Existing doctrines—in particular, fair use and *de minimis* copying<sup>31</sup>—may well account for these buffer copies, but those doctrines could also have applied to RAM copies of computer programs before the creation of the essential step rule. The rule’s very existence, though, seems to suggest that a parallel protection for other types of copyrighted works might be necessary—if not to make such copies legal, then to definitively state that they are.

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...said that for a license violation to be a copyright infringement, the license term violated had to deal specifically with one of the exclusive rights created in section 106. That is, the defendant had to breach a provision of the license agreement by doing something that implicated the copyright holder’s right to reproduce, adapt, publicly display, distribute, or publicly perform the software. Second, the court said that the rules governing bots were separate agreements—sort of side contracts. In other words, failing to meet those side agreements didn’t revoke the permission to make RAM copies elsewhere in the EULA. *MDY*, 629 F.3d at 940.

<sup>28</sup> Of course, like the computer programs mentioned above, lots of these songs, movies, and books are themselves subject to EULAs that say that they’ve been licensed, not bought.

<sup>29</sup> *MAI Sys. Corp. v. Peak Computer, Inc.*, 991 F.2d 511, 518 (9th Cir. 1993).

<sup>30</sup> *Cartoon Network LP v. CSC Holdings, Inc.*, 536 F.3d 121, 127-30 (2d Cir. 2008). There isn’t really an easy way to determine what is and is not a copy for copyright purposes. For instance, you could try and draw a line, saying that anything less permanent than the there-until-deleted RAM copies of MAI is not fixed enough to be a “copy,” or you could try to say that anything that lasts longer than the 1.2 seconds of the *Cartoon Network* buffers is a “copy.” The reality is that there isn’t likely to be any specific period of time that will be the right answer—the duration is just one of the factors that will make the determination of whether a particular instance of a work is a “copy.”

<sup>31</sup> “*De minimis*” comes from a legal maxim, “*De minimis non curat lex*,” which roughly means “the law doesn’t care about little things.” If the copying is of such an insignificant amount, or of such fleeting duration, it might not even qualify as being a copy, legally speaking.

<sup>32</sup> See, e.g., *Universal City Studios v. Corley*, 273 F.3d 429, 441 (2d Cir. 2001); but see, e.g., *Chamberlain Group, Inc. v. Skylink Techs, Inc.*, 381 F.3d 1178, 1200-01 (Fed. Cir. 2004).

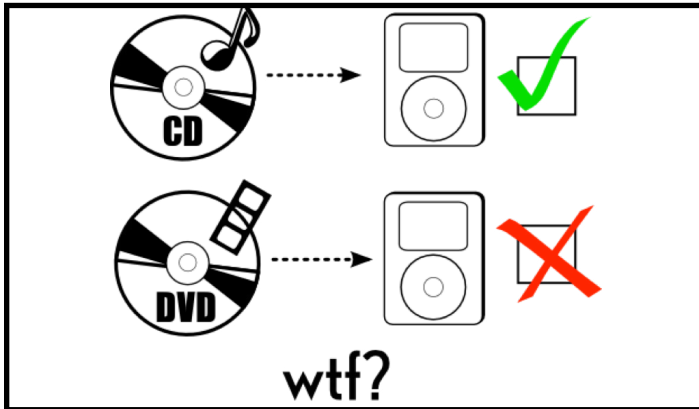
This is not a particularly new problem—even early on, portable CD players incorporated buffers to protect against skipping, reading music off of the CDs and playing from the buffer instead of directly from the disc. The shift from playing directly off of the recorded media (LPs, cassette tapes) to digitally mediated playback went largely without comment from copyright holders, but it is now the norm. As the distinctions between software and media erode (both are merely bits that are executed in different software environments), the exclusion of text, audio, and video files from the essential step rule looks increasingly anachronistic.

## Software Locks and Laws Against Circumvention: “If You Can’t Hack It, You Don’t Own It”

Consumers’ control over the media they buy is also being eroded by digital restrictions. Digital Rights Management, or DRM, is software that restricts access and copying of copyrighted works. And while users theoretically retain all of the first sale and fair use rights they have to their media even when it’s saddled with DRM, the DRM can prevent them, both practically and legally, from exercising those rights.

That’s because, under one common interpretation of the law, it’s illegal to pick the digital locks to content you already own, even if it’s for a completely legal purpose.<sup>32</sup> So even if it’s perfectly legal for me, under fair use, to rip my DVD to my computer so I can watch it on my tablet, it’s illegal for me to circumvent the DRM on the DVD in order to do so. It’s like being sued by your car manufacturer for picking the lock to your own car.

This state of affairs conflicts with the idea that property owners have the inherent right to modify their belongings, in line with the doctrines of repair that have existed both in patent and copyright law. Consumers' ability to rip audio CDs so as to space-shift the music onto different devices has largely been accepted by most,<sup>33</sup> even if it hasn't been directly tested in court after decades of common practice.<sup>34</sup> It also runs contrary to the constant mantra of the hacker and maker communities, which is that if you can't hack something, you don't actually own it



It's strange that you can rip a cd but not a dvd.

<sup>33</sup> *RIAA v. Diamond Multimedia Sys.*, 180 F.3d 1072, 1079 (9th Cir. 1999). "The Rio merely makes copies in order to render portable, or "space-shift," those files that already reside on a user's hard drive. Such copying is paradigmatic noncommercial personal use entirely consistent with the purposes of the Act."

<sup>34</sup> Arguing for the recording industry before the Supreme Court, Donald Verrilli conceded that ripping audio CDs into mp3s was likely a fair use: "The record companies, my clients, have said, for some time now, and it's been on their Website for some time now, that it's perfectly lawful to take a CD that you've purchased, upload it onto your computer, put it onto your iPod. There is a very, very significant lawful commercial use for that device, going forward." Transcript of Oral Argument at 12, *MGM Studios, Inc. v. Grokster, Ltd.* 545 U.S. 913 (2005). Later statements from the industry, though, have attempted to back away from this. See, e.g. Ryan Singel, *RIAA Believes MP3s Are a Crime: Why This Matters*, Wired Threat Level, Jan. 9, 2008, <http://www.wired.com/threatlevel/2008/01/riaa-believes-m/>.

## Reconciling Digital Property with Digital Copyrights: Ways Forward

Not all of these problems necessarily stem from changes in technology—many of them were there from the birth of first sale. All of them, though, are becoming increasingly prominent due to technology. While other publishers might have tried to contract around the *Bobbs-Merrill* decision, it wasn't until software EULAs became common that every consumer was agreeing to licenses on a daily basis. Regardless of whether technology has created new conflicts or simply exposed latent contradictions in values, the tensions surrounding the first sale doctrine are increasing.

### Quick Solutions

#### Extend the Essential Step Doctrine to Cover More Than Just Computer Programs

As noted above, any use of digital media, whether playing a music file or reading an ebook, results in copies being made, possibly subjecting the user to copyright liability. We could fix this by extending the essential step doctrine's protections beyond just the owners of computer programs to the owners of all different sorts of media. For instance, 117(a) - the place where the essential step doctrine lives in the law - could be amended to read:

Notwithstanding the provisions of section 106, it is not an infringement for the owner of a copy **or phonorecord of a computer program** to make or authorize the making of **a another copy-reproduction** or adaptation of that copy or phonorecord ~~computer program~~ provided:

(1) that such a new copy, **phonorecord**, or adaptation is created as an essential step in the utilization of the ~~computer program~~ **copy or phonorecord** in conjunction with a machine and that it is used in no other manner...<sup>35</sup>

This relatively small change should allow RAM, cache, and buffer copies of digital media like mp3s, ebooks, and movie files, without permitting widespread copying. Just as the essential step rule currently only allows those reproductions that are necessary to use the program, the changes would allow only those copies that are necessary to use the media. If necessary, "use" could be replaced with a term that more specifically includes the consumption of the media as intended—the ability to read a book, or view a movie, or listen to music.

Of course, we'd want to make sure that usage included more than the bare minimum. Being able to read a book but not flip back and forth among pages would be pointless. The same would be true of a movie where you couldn't pause, fast-forward, or rewind. All of those abilities are encompassed within the idea of ordinary use of those types of works.<sup>36</sup>

#### Users, Not Just Owners, Can Make RAM Copies of Programs

Another major limitation of the essential step rule is the fact that, according to most software EULAs, it simply is never applied. The guarantee that I'm not becoming a copyright infringer every time I run a program simply doesn't apply if I'm not the owner of that program. This problem could be solved simply by changing the words of the law so that it applies to any given user of a computer program, not just the owner.

Using a computer program without owning it should, by and large, be legal. After all, if very few copies of computer programs are owned anyway, why should we start with a baseline presumption of illegality with their use? Even when we're talking about some other person using the software—say I'm the person who paid for the program, but my roommate is using my computer—that other user shouldn't, by default be considered an infringer, either. Even in a worst-case scenario—some jerk steals my laptop and then boots up *Portal 2*—I'm not sure that Valve (the maker of *Portal 2*) needs to have a civil cause of action against the thief for copyright infringement in addition to my (and the state's) cause of action against him for theft.

<sup>35</sup> Other parts of section 117 that we haven't discussed here allow owners of computer programs to make backup copies for safekeeping (but, importantly, not for further redistribution). Those same provisions could also be applied to other digital media.

<sup>36</sup> At the same time, we'd want to make sure that we weren't freezing the concept of "ordinary uses of works" at one particular moment in time. While doing a text search of a book wasn't an ordinary use when all books were paper, it's certainly an expected part of usage of digital books.

Software manufacturers might argue that changing the law in this way would deprive them of the ability to sue unauthorized users for copyright infringement. While certain copyright lawsuits might be prohibited—not every breach of a EULA would then rise to the level of copyright infringement—the ability to sue users for breaking the terms of an agreement would still be in place, through contract law and other doctrines. After all, copyright law was never intended to act as a punitive extension of contract law. Nor would copyright enforcement of software be harmed.

Lawsuits for unauthorized reproduction and adaptation of computer programs would still be available—all that a plaintiff would have to show is that the allegedly infringing copies weren't actually necessary for the use of the program by a legitimate user. The copy of *Fallout 3* sitting on my friend's hard drive certainly wasn't necessary for my use of the program while I played it on mine, so in that case, I'd still be easily found liable.

Similar changes might also be relevant for first sale more broadly, granting distribution rights for a possessor, and not just an owner. The way the law is written now, it's a copyright infringement if I lend or give a Netflix DVD (which I don't own) to a friend. Do we really need for the movie studios to go after me, or isn't the ability of Netflix to sue me for breaking a contract or literally stealing their DVD enough?

## Distributing Born-Digital Copies

The problem of born-digital copies and their distribution could be resolved in at least two ways. The first would be to include a limited form of the reproduction right as part of the first sale section of the law. In addition to allowing the distribution and the public display of lawfully made and owned copies of copyrighted works, the law could allow the lawful owners of lawful copies to make reproductions of the works necessary to the transfer of ownership of a copy to one other party, provided that the other party be the only one in possession of a copy at the end of the transfer, and that no more than one of the parties has the use of the work at one time.

The exact drafting of this provision would need to be refined, but the concept is simple. Just as the use of computer programs (and for that matter, all digital media) requires the making of certain temporary reproductions, the digital transfer of copies requires there to be, at least for a time, reproduction of the work.

Skeptics of this approach might note that the copyright holder would have to rely upon the goodwill of the transferring parties not to make more permanent reproductions in the course of the transfer and just keep the copy they claim to have sold to someone else. This is true. However, it is not a significant change from the state of play now. Photocopiers continue to operate without licenses from copyright holders despite the fact that they may be used for infringing reproductions.

Nor would peer-to-peer filesharing of infringing copies be allowed to proceed rampantly in the open with a wink and a nod. It would be more than possible to convince a judge or jury by a preponderance of the evidence that someone who uploaded a file to a standard p2p network was not deleting it after transfer. Downloading that same file from the same source twice would be even more convincing.

An alternative solution to the born-digital problem might be the legal ability to transfer not the copy per se, but a particular user's rights to access a copyrighted work. Jason Mazzone, in his book *Copyfraud and Other Abuses of Intellectual Property Law*, suggests not only allowing the law to permit lawful users to transfer not just their copies, but also their access to copyrighted works.<sup>37</sup>

The owner of a DVD would, just as now, be able to transfer that DVD to another, provided (as she naturally must) that she gives up her possessory interest in the DVD. The same would be true for a "licensee" of a copy of a videogame. Regardless of whether or not he was an owner of that particular copy, he could transfer whatever rights the EULA granted to him to another person, provided he gave up all of his rights under the EULA in the course of the transfer. The work wouldn't be multiplied in any way, so the copyright holder's monopoly would remain secure. This would be true regardless of whether the copy of the software was housed on optical disks or was born as a digital download.

One notable difference in this approach is that it can also easily apply to things like database subscriptions and other types of limited access. A user could transfer her rights to access a database of articles to another, provided that she gave up her ability to access it. The new user could use her login credentials until her subscription ran out. Copyright (and subscription service) owners might dislike such a system because it interferes with their ability to price discriminate. However, remedies for that could still exist under contract law, or it might even be the case that the benefits of such a system would outweigh the loss of the ability to discriminate.

<sup>37</sup> Jason Mazzone, *Copyfraud and Other Abuses of Intellectual Property Law* 135-38 (Stanford Law Books 2011).

## Even More Fundamental Questions

### Restricting types of copy transfers?

Many of the problems that stem from EULA restrictions come from the fact that they can create their own labyrinthine rules of what is and isn't legal, even aside from the existing complexity of copyright law. One proposal to reduce the uncertainty would be to simply limit the types of restrictions that manufacturers can place on the use of copies that they sell.<sup>38</sup> While this might seem like a radical reduction in peoples' rights to make contracts for themselves, it actually is just an outgrowth of a very old property law doctrine. Those restrictions are counterbalanced by making the property system clearer and easier for everyone to understand, and prevent future transactions from being entangled in ever-more-complex legal webs—exactly the sort of situation we face today with copies of copyrighted works.

### Re-drawing the lines of exclusive rights?

All of these various proposals still largely accept as a given the framework set out by existing copyright law—the idea that the making of copies, of reproductions, is generally the operative act on which we hang liability—if the making of the copy isn't authorized by the author or by law.

A few years ago, Danny O'Brien wrote a blog post comparing prohibitions on the making of copies to “window taxes.” Copyright, O'Brien said, had a similar problem. The making of a copy—a new reproduction—used to be an easily identifiable act that could serve as a useful proxy for commercial exploitation. I might say that the making of a public performance, or the preparation of a derivative work also served much the same function. Now, however, that signal no longer correlates to what you're actually trying to measure.

From 1696-1851, Britain had a tax on windows on buildings, not because windows themselves had any particular significance, but because, absent reliable income records, windows served as an excellent proxy for how rich you were. One window: lower middle class. Forty windows: stinking rich.

As time went on, the proxy began to fail. Smart rich people blocked up their windows, flashy ostentatious people built buildings with lots of windows, and windows themselves became cheaper. Rather than acting as a successful measure, it did nothing but warp the revenue system and distort the nature of architecture.<sup>39</sup>

Courts are starting to identify all of the different ways in which our copyright laws don't mesh neatly with the normal workings of computers. Perfectly ordinary and unremarkable computer usages—caching, backing up, file transfers—suddenly raise the specter of copyright liability.<sup>40</sup> So far, courts have tried to resolve these conflicts through careful application of fair use and ever more finely grained interpretations of definitions. But fair use is a tricky concept to pin down, and it would seem odd for it to bear the weight of so much everyday activity, just to keep all of us from being potential infringers.

As technology advances, we can see the relationship diminishing between the structure of the Copyright Act and the reality of how authors and audiences alike value and use copyrighted works. Some of the gaps between this system and reality were apparent early on—the distinction between our treatment of reproductions and public performances indicates that. And increasingly, consumption of copyrighted works comes not through the distribution of fixed copies, or even the distribution of digital ones. People listen to music via subscriptions to Spotify, pay for online access to the *New York Times* and *Wall Street Journal*, and “rent” (actually, pay for streaming access to) digital movies from Amazon. Access, not copies, seems to be more the question. We own copies now; we don't necessarily own access. Should we be able to trade access, as Mazzone suggests? This is actually more than just a fix for the first sale doctrine; it's a realignment of how we think of copyright and what the value of the thing is.

But we need not stop at access—what about the ability to use? Digitized media can contain any number of barriers not just to access, but to use as well. These restrictions can be very fine-grained. We can imagine a system where you can pay one amount to read a book, another to have the ability to flip back a few pages, another amount to search the text, another amount to be able to cut and paste from it, and so on. Such a system seems at best tedious and at worst dystopian, but it's within the realm of technological possibility.<sup>41</sup> But regardless of its flaws, it still is another way that the rights of authors could be apportioned.

Certainly, existing licensing agreements have tried to condition the grant of existing exclusive rights on such fine distinctions. But what happens if that apportionment is baked into the law, as opposed to being something that two parties have to agree to for it to be operative?

<sup>38</sup> Christina Mulligan, *A Numerus Clausus Rule for Intellectual Property* (March 6, 2012) Tennessee L. Rev. (forthcoming), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2017023](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2017023).

<sup>39</sup> Danny O'Brien, Oblomovka, “Copyright, Fraud, and Window Taxes (No, not that Windows),” Aug. 7, 2008, <http://www.oblomovka.com/wp/2008/08/07/copyright-fraud-and-window-taxes-no-not-that-windows/>.

<sup>40</sup> See Mike Madison, Madisonian.net, “HathiTrust Wins This Round,” Oct. 10, 2012, <http://madisonian.net/2012/10/10/hathitrust-wins-this-round/>.

<sup>41</sup> Rick Falkvinge, “Stallman's ‘The Right to Read’ Becomes Dreaded Insane Reality.”



The transactional costs of such a world could be enormous, and the ability to share information greatly hampered. Clearly, there has to be a baseline set of rights that individual consumers have (and can rely upon) over the copyrighted works they have paid for. If that baseline isn't tied to ownership of a copy, what should it be?

I'm not certain that the concept of property ownership, which has survived centuries, if not millennia, of other legal doctrines, needs to go anywhere just to accommodate copyright as it advances into the digital age. So long as we recognize that someone must control the physical object upon which a work is embodied, we can assign the owner of the physical object clear rights to it. Copyright, the legal newcomer, can be made flexible enough to allow the new normal of digital ownership and usage of copies, while reserving for copyright holders a right for actions that multiply market-relevant instances of their works.

Doing this, however, will likely mean that copy owners will be able to make many sorts of what we today would call reproductions; and copyright holders might be able to prevent certain types of access that today would not even amount to distribution. The trick would be in properly defining those types of reproductions and those types of access clearly, precisely, and flexibly so that we're not left with another morass some decades down the road.